United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

CORRECTED COPY

76-1319

To be argued by
DAVID J. GOTTLIEB

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

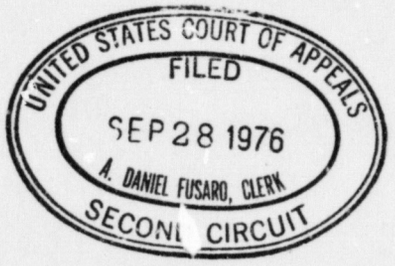
RICHARD THOMSON FORD,
a/k/a VINCENT A. THOMAS,
a/k/a JOHN A. AUGUST,

Defendant-Appellant.

Docket No. 76-1319

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- RICHARD THOMSON FORD, a/k/a VINCENT A. THOMAS, a/k/a JOHN A. AUGUST, Defendant-Appellant.	Docket No. 76-1319

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the Government's failure to try appellant Ford before returning him to state custody violated the Interstate Agreement on Detainers and requires a dismissal of the indictment.

2. Whether appellant was denied a speedy trial under the Sixth Amendment to the Constitution.

3. Whether because the delay in this case violated the Southern District Plan for Prompt Disposition of Criminal Cases, reversal of the conviction and dismissal of the indictment are required.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Constance Baker Motley) entered on October 14, 1975, convicting appellant Richard Thomson Ford after a jury trial of the offenses of bank robbery, transporting a stolen car in interstate commerce knowing the same to have been stolen, using a firearm to commit a bank robbery, and conspiracy to commit the above offenses (18 U.S.C. §§2, 371, 2312, 2113, and 924(c)(1)). Appellant Ford was sentenced to five years' imprisonment on each of the counts, the terms to run concurrently with each other. The court also recommended that appellant's sentence be served concurrently with a sentence he was then serving at the Massachusetts State Prison.

By order of this Court, The Legal Aid Society, Federal Defender Services Unit, was assigned to represent Mr. Ford on his appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. Initial Charges and Custody

On October 20, 1976, three men robbed a branch of the Orange County Trust Company, located in Middletown, New York

(see 42-48).[1] On November 11, 1971, a complaint and warrant were issued, charging Richard Thomson Ford with the bank robbery (see Complaint and Warrant, 71 Cr. 1010). Authorities learned that Mr. Ford had escaped from a Massachusetts prison in 1968. However, they did not know that Mr. Ford was, in 1971, living in Greenwood Lake, New York, a community near Middletown. Appellant Ford remained a fugitive until October 11, 1973, when he was arrested in Chicago by the FBI on warrants charging both the bank robbery and interstate flight to avoid confinement (439-444, 657-658, 670-682). On October 17, 1973, the Government dismissed the escape warrant and turned appellant over to the Illinois authorities to assist extradition to Massachusetts on the state escape charge. While incarcerated in Chicago, appellant Ford submitted a letter informing the United States Attorney for the Southern District of New York and the United States District Court for the Southern District of New York of his whereabouts and requesting a speedy trial on the federal charges.[2] Before any action was taken on his request, Ford was extradited to Massachusetts to stand trial for the escape charge, and the

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[1]Numerals in parentheses refer to pages of the transcript of the trial.

[2]See defense motion and affidavit dated November 4, 1974, included as D to the separate appendix to appellant's brief.

federal warrant was lodged as a detainer.[3] On February 8, 1974, appellant Ford pleaded guilty to the escape and assault charges in Massachusetts. He was sentenced on that same date to concurrent terms of from eight to ten years' imprisonment, which term he is currently serving.[4]

On March 21, 1974, appellant was charged in the Southern District of New York in a two-count indictment (74 Cr. 279) with bank robbery. The case was assigned to Judge Bauman. On March 25, 1974, the Government secured a writ of habeas corpus ad prosequendum[5] requesting appellant's presence in federal custody from April 1, 1974, until he was "discharged or convicted and sentenced on said indictment." On April 1, 1974, the Government also filed a notice of readiness with respect to Indictment 74 Cr. 279.

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[3]See Government motion and affidavit dated May 16, 1974, at 2, included as E to the separate appendix to appellant's brief.

[4]See Government motion and affidavit dated May 16, 1974, at 2.

[5]The writ is H to the separate appendix to appellant's brief.

On April 3, 1974, the present superseding indictment -- 74 Cr. 336 -- was filed, charging appellant Ford, his co-defendant James Flynn, and others with bank robbery, use of a firearm to commit a felony, interstate transportation of a stolen car, and conspiracy to commit the above offenses.[6]

On April 15, 1974, appellant was arraigned on the indictment. However, appellant's co-defendant, James Flynn, failed to appear for arraignment and his bail was forfeited and a bench warrant issued (Transcript of Arraignment Hearing at 2-4). Mr. Flynn never appeared, and he remained a fugitive through the entire period of this case.

On the afternoon of appellant Ford's arraignment, a hearing was held on a Government motion, first submitted orally on April 1, 1974, to require the production of handwriting, hand printing, and hair exemplars. Appellant refused to provide the samples. The court ordered appellant to provide the samples within one week or face punishment for contempt (Transcript of Hearing on April 15, 1974, at 2-4).

Appellant agreed to furnish the handwriting exemplars. However, on April 25, 1974, when he persisted in his refusal to give hair exemplars, the Government moved that appellant be held in criminal contempt. Instead, Judge Bauman held appellant in civil contempt and informed appellant that if

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[6]The indictment is B to the separate appendix to appellant's brief.

he persisted in his refusal he would at some future time be held in criminal contempt (Transcript of Proceedings of April 25, 1974, at 14-15). A trial date of May 28, 1974, was set by the court. The Government requested that the trial not begin until approximately that date for two, and only two, reasons: because the co-defendant, Flynn, was a fugitive, and the Government hoped to find him; and because the Assistant U.S. Attorney was busy preparing a brief on appeal. The court permitted the continuance, in which the defense acquiesced. Judge Bauman stated that a continuance was permissible since appellant was incarcerated in another jurisdiction and was not prejudiced by the delay in the same way as if he were being detained for trial. However, the court indicated its willingness to proceed with a severed trial of appellant Ford on May 28 if the co-defendant were not found (Transcript of Proceedings of April 25, 1974, at 16-18).

On May 17, 1974, the Government moved for an additional ninety-day postponement of Ford's trial in order to locate the co-defendant Flynn. The Government defended its request, inter alia, on the grounds that it would waste time to undertake two trials; that the co-defendant was an armed and dangerous fugitive; and that the requested adjournment was permitted as an excludable period under the Southern District speedy trial rules. The Government also claimed that appellant Ford would not be prejudiced by the delay because he was then serving a sentence in Massachusetts for escape.

Finally, the Government argued that the defendant had prejudiced the Government by his failure to provide hair exemplars.[7] In support of the application, the Government also submitted a sealed affidavit to Judge Bauman.[8] Defense counsel, on May 22, 1974, objected to the Government's request for a delay. Counsel pointed out that appellant, almost immediately after his arrest, had requested a speedy trial. Counsel also noted that the Government had already received one adjournment (until May 28) for the purpose of locating the co-defendant. Finally, counsel stated that appellant was prejudiced by the delay since the federal detainer lodged against him in Massachusetts in connection with this trial had made him ineligible for work release and furlough programs at the state institution. (see Transcript of Proceedings of May 22, 1974).

Over defense objection the court granted the Government's motion and set a trial date for August 21, 1974. Following the hearing, on June 14, 1974, appellant Ford was removed from federal custody and transferred back to Massachusetts.

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[7]See Government affidavit dated May 17, 1974.

[8]Appellant has submitted a request to the United States Attorney's office for an opportunity to inspect the sealed affidavits submitted in this case. That request is pending as of the time of the preparation of appellant's brief.

In August, 1974,[9] the case was reassigned to The Honorable Constance Baker Motley. On or about August 16, 1974, the defense was informed that the case had again been continued, this time until November 18, 1974. The continuance, apparently not determined in open court with counsel present, was without appellant Ford's assent, and was granted over his objection.[10] The record does not reflect the reason for this three-month extension.

On November 1, 1974, the Government again moved, this time before Judge Motley, for an adjournment of ninety days to locate the co-defendant, Flynn. The Government supported its decision for essentially the same reasons as those in its motion of May 17. Again, the Government argued that the request comported with the Southern District speedy trial rules, and again the Government submitted a sealed affidavit in support of its motion. On November 4, 1974, the defense moved, under the Rules of the Southern District of New York and the United States Constitution, for an order dismissing the indictment, on the grounds that appellant was being denied his right to a speedy trial. Counsel alleged that appellant was being prejudiced, inter alia, by the denial of furlough

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[9]See Government motion and affidavit dated November 1, 1974, annexed as G to appellant's separate appendix.

[10]See appellant's motion and affidavit dated November 4, 1974, at 3.

privileges afforded by Massachusetts while the detainer was lodged against him. On November 4, 1974, the court granted the Government's request -- its third -- to postpone the trial, and denied appellant's motion to dismiss.

On February 18, 1975, the scheduled trial date, Judge Motley announced that still another continuance would be mandated since she was then engaged in a trial. The court set a new trial date of June 11, 1975. Defense counsel stated:

> May I just say for the record, Your Honor, that the defendant Ford would object to the continuance for such a long period of time. I do realize the court has a case on trial now, but in view of his former motion to dismiss because of being denied a speedy trial, I think I have to be consistent.
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> Minutes of Hearing on February 18, 1975, at 4.

The court indicated that it would attempt to try the case before June 11 if that were possible. Instead, prior to June 11, and apparently again not in open court, the Court informed the defense that the trial was again postponed, this time until September 2, 1975. This continuance, the reasons for which do not appear on the record, was taken without appellant Ford's consent and over his objection.[11]

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[11] See appellant's motion and affirmation dated August 29, 1975, annexed as E to appellant's separate appendix.

On August 8, 1975, the Government filed another writ of habeas corpus ad prosequendum to secure appellant's appearance at trial.

Appellant's trial began on September 2, 1975. On that date appellant again moved to dismiss the indictment because of a denial of a speedy trial under the Sixth Amendment and the Southern District speedy trial rules. The following day Judge Motley denied the motion.

B. The Trial Evidence

A number of witnesses testified that on Wednesday, October 20, 1971, at 11:15 a.m., three masked and armed men entered the Orange County Trust Company, stole some bags which, pursuant to normal procedure, had been packed with money for pickup by Brinks, and escaped with over $200,000. While none of the witnesses could identify any of the robbers, one of the employees was able to write down the license plate number of the getaway car, a 1972 beige Plymouth (42-51, 72-82, 92-102, 112-117, 133-139, 146).

Catherine Whooley, a nurse who was standing near the bank during the robbery, testified that she saw appellant and two other males drive past her in a beige-colored car. She identified the car as similar to the getaway car described by the bank teller (187-195).[12]

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[12]On cross-examination of Ms. Whooley the defense produced a photo array from which the witness had formerly selected

A few moments later the getaway car was drivin into a high school parking lot where it was exchanged with a blue 1972 Ford (272-282). A high school student, Thomas McCoy, witnessed this transfer, and at first identified appellant as the driver of the blue car. However, at a later point in the trial, he completely recanted his identification, admitting that he could not tell who the driver was (286, 667-669). The blue getaway car, stolen from Logan Airport in Boston a few days before the robbery, was the basis of the interstate transportation of an auto charge (365; Government Exhibit #71-11).

The principal evidence p[illegible]ng Flynn's participation in the conspiracy involved the above-mentioned automobile. The Government showed that an individual named Robert Barry, of Lynn, Massachusetts, registering in the Middletown Holiday

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(Footnote continued from the preceding page)

appellant's picture. However, during trial Ms. Whooley stated that she had not picked out the photo of appellant shown to her. In this particular photo array, appellant's photo is the only one with his name printed at the bottom.

Ms. Whooley was also shown a second spread of photos in which appellant's picture was also included. After originally viewing the array, she had picked out one of the passengers. However, at trial, she misidentified the photo she had picked out.

The above matters were first raised during cross-examination as a result of the defense's failure to move to exclude the witness' in-court identification prior to trial (201-202, 213-252). During summation, defense counsel argued that the witness' failure to identify the photos correctly and the possibly suggestive nature of the array were reasons to discredit her in-court identification (795-802).

Inn on September 18, two days before the robbery, had listed the make and license number of the car stolen from Boston and used in the robbery. Robert Barry was found to be a fictitious name. However, co-defendant Flynn's fingerprints were found in the room where "Mr. Barry" stayed. It was also determined that a long distance call was placed from a pay telephone at the Holiday Inn to Flynn's residence that evening (366-376, 397, 406-408, 416-439).

The remainder of the Government's case consisted of evidence tending to show appellant Ford's opportunity to commit the robbery and evidence allegedly tending to prove consciousness of guilt. The Government showed that appellant lived in Greenwood Lake, New York, during 1971, under the name of Vincent Thomas; that he worked for a plumbing company which did a good deal of work in Middletown, New York; that he often ate lunch and cashed checks in a store across the street from the bank; that he was often dropped off from work at the store across the street from an auto dealership from which the beige Plymouth used as the first getaway car was stolen; that he did not work on the day of the robbery; and that two days later he and his wife left Middletown without leaving a forwarding address (442-445, 480-481, 498-499, 504, 527-528, 546, 550-551, 553-557). The Government also showed that Ford was arrested in Chicago on October 11, 1973, under the name of John August. As additional evidence of consciousness of guilt, the Govern-

ment introduced, over objection, testimony establishing appellant's refusal to furnish hair exemplars (657-658, 673-682, 690-692).

Finally, the Government produced two items of evidence allegedly showing a nexus between Ford and Flynn: a telephone conversation initiated by Ford to his wife from the Middletown Holiday Inn on the night of October 18, and, over objection, a money order from Flynn to one Ellen Fitzgerald addressed to Suffern, New York, a location a short distance from Greenwood Lake. Ellen Fitzgerald wa. an alias used by appellant's wife (387-400, 473-479, 26-30, 39, 718; Government Exhibits #101-103, #110).

Following summations, the court's charge, and approximately twelve and one-half hours of jury deliberations, appellant was found guilty on all four counts of the indictment (911-912). On October 14, 1975, appellant was sentenced to five years' concurrent imprisonment on all four counts, with the recommendation that the sentence be served concurrently with appellant's Massachusetts sentence.

ARGUMENT

Point I

THE GOVERNMENT'S FAILURE TO TRY APPELLANT FORD BEFORE RETURNING HIM TO STATE CUSTODY VIOLATED THE INTERSTATE AGREEMENT ON DETAINERS AND REQUIRES A DISMISSAL OF THE INDICTMENT.

Following appellant's arrest in October 1973, he was transported to Massachusetts to stand trial for escape. At that time the federal arrest warrant charging him with bank robbery was "lodged as a detainer" in Massachusetts (see Government affidavit dated November 1, 1974). Appellant was convicted in Massachusetts on February 8, 1974, and immediately sentenced to prison. On March 25, 1974, a writ of habeas corpus ad prosequendum was issued, requesting appellant's presence in federal custody from April 1, 1974, until "the said RICHARD THOMSON FORD shall have been discharged or convicted and sentenced on said indictment." On March 30, 1974, appellant was brought to New York to await trial. However, following the granting of the Government's motion, over defense objection, to adjourn the trial from its scheduled starting date on May 28, 1974, appellant was returned to Massachusetts and state custody without having been tried.[13] The failure to try appellant prior to his

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[13] Appellant was subsequently produced for trial pursuant to another writ of habeas corpus ad prosequendum.

return to state custody violated Article IV(e) of the Interstate Agreement on Detainers. Accordingly, the indictment must be dismissed with prejudice. United States ex rel. Esola v. Groomes, 520 F.2d 830 (3d Cir. 1975); United States v. Mauro, 414 F.Supp. 358 (E.D.N.Y. 1976), appeal pending, 2d Cir. Doc. Nos. 76-1251, 76-1252.

In 1970 Congress adopted the Interstate Agreement on Detainers (18 U.S.C.A. Appendix), a compact providing a uniform procedure for obtaining the presence for trial of criminal defendants, such as appellant in this case, incarcerated in other jurisdictions.[14] Article III of the agreement specifies the means by which a prisoner may demand trial of any untried complaint or indictment which is the subject of a detainer lodged by a party state. Article IV, on the other hand, provides the means by which a state (including the Federal Government) which has lodged a detainer may obtain the defendant from another jurisdiction for temporary custody for trial:

> (a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with

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[14]Massachusetts is also a party to the agreement. M.G.L.A. c.276 app. §§1.1-1.8.

> Article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated....

Article IV establishes two conditions for a state which detains a prisoner, like appellant, in one jurisdiction for trial in another: first, that a trial on the charges forming the basis for the detainer be held within 120 days, unless the court grants a continuance "for good cause shown in open court, the prisoner or his counsel being present " Art. IV(c). Article IV(e) provides the second principal condition:[15]

> If trial is not held on any indictment, information, or complaint contemplated hereby prior to the prisoner's being released to the original place of imprisonment pursuant to Article V(e), hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

There is no doubt that the United States, which had lodged a detainer in Massachusetts, made a request to Massachusetts for the temporary custody of appellant for trial. In fact, the Government's writ of habeas corpus ad prosequendum, issued in March 1974, stated specifically that it was

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[15]Since this section does not require any defense motion prior to the court's order, this issue has not been waived by defense counsel's failure to move to dismiss under the Agreement at trial, and the issue may be raised on appeal. See United States v. Ricketson, 498 F.2d 367, 372-373 (7th Cir.), cert. denied, 95 S.Ct. 227 (1974).

for the purpose of custody of appellant until after his trial. There is also no question that the conditions of Article IV of the Interstate Agreement were not met here. Despite the language of Article IV(e) prohibiting the transfer back of a prisoner prior to disposition of the charge, appellant was returned to Massachusetts before his trial, after the Government was successful over defense objection in delaying his trial. Once that transfer occurred, the court was bound, under Article IV(e) of the Agreement, to dismiss the indictment. United States ex rel. Esola v. Groomes, supra; United States v. Mauro, supra; see also United States v. Ricketson, 498 F.2d 367, 373 (7th Cir.), cert. denied, 95 S.Ct. 227 (1974) ("[T]here are no exceptions to the requirement that that defendant not be returned to state custody untried.")[16]

Groomes and Mauro are directly on point. There, as here, prisoners were transported from their place of incarceration to the jurisdiction which had lodged a detainer pursuant to a request for temporary custody via a writ of habeas corpus ad

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[16]Moreover, the proceedings in this case also violated the requirement of Article IV(c) that the defendant be tried within 120 days of the arrival of the defendant in the receiving state, with the proviso that reasonable continuances may be granted. While we submit that the continuances in this case were not reasonable (see Points II and III, infra) even if we are incorrect, those continuances could be granted only in open court, with counsel or the defendant present. At least two continuances in this case (August 21, 1974, to November 18, 1974; June 11, 1975, to September 2, 1975) were apparently granted without any court hearings, resulting in a violation of Article IV(c) as well as of IV(e).

prosequendum. In both cases, as here, the defendants were produced for trial. Moreover there, as here, the defendants were returned to the original jurisdiction prior to trial. Thus here, as there, dismissal must result.[17]

We anticipate that the Government will argue that the transfers involved here, because they were initiated by writ of habeas corpus ad prosequendum, were not transfers under Article IV of the Agreement on Detainers. That argument must fail, since it ignores the very purpose of the Agreement which, in essence, is to regulate and codify the use of remedies such as the writ of habeas corpus ad prosequendum.

One of the principal reasons for the adoption of the Interstate Agreement was to minimize the adverse impact, caused by unprocessed and untried detainers, of a foreign prosecution on inmate rehabilitation.[18] In particular, when

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[17]In Groomes, the court remanded the case rather than dismissing the indictment only because the court below had failed to make any findings of fact on the validity of the allegations.

[18]The purposes of the Agreement, as set forth in Article I, are as follows:

> The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trials of persons already incarcerated in other jurisdictions, produce uncertainty which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such

a prisoner is needlessly shifted between two jurisdictions, successful rehabilitation is foreclosed because of the lack of presence of the inmate in a single jurisdiction and the adverse psychological effects of the still-unprocessed detainer. United States v. Mauro, supra, 414 F.Supp. at 360; United States ex rel. Esola v. Groomes, supra, 520 F.2d at 836-837; United States v. Cappucci, 342 F.Supp. 790 (E.D.Pa. 1972); 116 Cong. Rec. 14000 (1970) (Remarks of Congressman Poff). Thus, while the Interstate Agreement has many advantages for the Government, the drafters included the modest and easily followed sanctions of IV(e) prohibiting repeated transfers.

Because the agreement is "obviously remedial in character" (see United States ex rel. Esola v. Groomes, supra, 520 F.2d at 836; State v. West, 191 A.2d 758, 760 (N.J. App. 1966); People v. Esposito, 37 Misc.2d 386 (N.Y. 1960)), it should be construed liberally to effectuate its purposes. To interpret

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(Footnote continued from the preceding page)

> charges and the determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to promote such cooperative procedures.
>
> 18 U.S.C. Appendix.

the filing of a writ of habeas corpus ad prosequendum in any way other than as a request for custody under the Agreement would be to render the limited sanctions of the Agreement useless and the agreement itself an exercise in legislative futility. Thus, as both cases considering this issue have held, where the Agreement on Detainers is applicable for securing the presence of a defendant in custody, it is the exclusive process for doing so, and the Government is charged with having invoked its provisions by use of the writ. United States ex rel. Fsola v. Groomes, supra; United States v. Mauro, supra.

Since the Agreement was fully applicable here, the Government must be held to have obtained appellant pursuant to the Agreement. Once appellant was returned to state custody before being tried, in violation of Article IV(e), the indictment should have been dismissed.[19]

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[19] In Mauro, the Government also argued that the Agreement on Detainers only applies to the Government when it acts as a "sending state," and does not apply when the Federal Government secures a prisoner from state custody. There are at least three problems with this argument: First, the cases interpreting the Agreement have, without dissent, treated the Government as a receiving state as well as a sending state. United States v. Mauro, supra; United States v. Mason, 372 F.Supp. 651 (N.D.Ohio 1973). Second, there is absolutely no evidence from the legislative history of the adoption of the Agreement that such a limitation was intended (see 3 U.S. Code Cong. Admin. News 4864, 4866, 4869 (1970)). Most significantly, the Agreement, by its terms, contains no such limitation.

Point II

APPELLANT WAS DENIED A SPEEDY TRIAL UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION.

Almost immediately after his arrest, appellant requested, by letter to the Southern District court and United States Attorney's office, that he be provided a speedy trial. Thereafter, on numerous occasions following his indictment, appellant objected to the constant adjournments reflected on the record of this case and moved for a speedy trial. Despite these efforts, appellant was not brought to trial until 23 months after his arrest, and over 17 months after the indictment was filed. Because this delay was inexcusable and prejudicial as well as lengthy, appellant was denied his right to a speedy trial as guaranteed by the Sixth Amendment. Accordingly, the judgment of conviction must be reversed and the indictment dismissed.

The validity of a speedy trial claim depends upon an analysis and balancing of four factors: the length of the delay, the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 530 (1972); United States v. Drummond, 511 F.2d 1049, 1054 (2d Cir.), cert. denied, 96 S.Ct. 81 (1975); United States v. Infanti, 474 F.2d 522, 527 (2d Cir. 1973). No single one of the above four factors is a necessary precondition for a finding of a deprivation of a speedy

trial. Moore v. Arizona, 414 U.S. 25, 26 (1973); Barker v. Wingo, supra, 407 U.S. at 533. "Rather, they are related factors and must be considered together with such other circumstances as may be relevant." Barker v. Wingo, supra, 407 U.S. at 533. Here, analysis of the four factors compels the conclusion that appellant's speedy trial right was violated.

"The length of delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors which go into the balance." Barker v. Wingo, supra, 407 U.S. at 530. Here, the length of time from arrest to trial was 23 months, from the first indictment to trial almost 18 months -- periods of delay more than ample to "trigger" inquiry into the other enumerated factors. Strunk v. United States, 467 F.2d 969, 972 (7th Cir. 1972), reversed on other grounds, 412 U.S. 434 (1973); United States v. Latimer, 511 F.2d 498,501 (10th Cir. 1975); United States v. Fay, 505 F.2d 1037 (1st Cir. 1974); see United States ex rel. Spina v. McQuillan, 525 F.2d 813 (2d Cir. 1975); People v. Johnson, 38 N.Y.2d 271 (1975).

With respect to the second factor in Barker, there is no question in this case that the delays in bringing appellant to trial were almost exclusively due to activities of the Government or the court. In particular, the delays between the originally scheduled trial date of May 28, 1974, to the actual commencement of trial on September 2, 1975, were due

to three court continuances, all unnecessary for the trial of appellant,[20] and all granted over defense objections.

The first court continuance postponed the case from August 1974 to November 1974, presumably as a result of the assignment of the action to Judge Motley. Judge Motley also postponed the case from February 1975 to June 11, 1975, because she was engaged in the trial of another matter. Finally, the case was again postponed by the court from June to September 1975 without explanation on the record. Since the burden of trying appellant rests upon the prosecution and the court, the responsibility for these scheduling delays "must rest with the government rather than the defendant." Barker v. Wingo, supra, 407 U.S. at 531. Moreover, unlike some calendar delays which are unavoidable, here, the court had within its power the tools to avoid these continuances.

Thus, in the first "court" continuance, presumably ordered as a result of the reassignment of the case, the case should have been reassigned to a judge ready to try it forthwith rather than to Judge Motley, whose first action, over defense objection, was to postpone the trial date three months to November 1974. Beyond that, Judge Motley could and should have reassigned the case in February 1975 -- the trial date

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[20] The record indicates that the Government, defense, and court were capable of going to trial on the originally scheduled date of May 28, 1974.

scheduled after the Government's second three-month continuance to locate the co-defendant was granted -- if she was occupied with a long trial, rather than continuing the case another six and one-half months. See Rules 14, 17, 18, Rules for the Administration of the Civil and Criminal Calendars of the Southern District of New York Under the Individual Assignment System (1972).

As this Court recently noted:

> Where a multiple judge court uses the individual calendar system, all judges must share responsbility for the prompt disposition of criminal cases, must employ a team approach to these cases, and, when necessary, must reassign them in order that they may be tried according to the commands of the Sixth Amendment and Criminal Rules 48(b) and 50. If a judge is otherwise long committed on another case or is delayed in getting to the criminal cases on his calendar by reason of illness, personal misfortune or press of other business, this obviously does not serve to toll the enforcement of the right of a defendant awaiting trial on that judge's criminal calendar.
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> United States v. Fay, supra, 505 F.2d at 1040-1041 (citing Hodges v. United States, 408 F.2d 543, 551-552 (8th Cir. 1969), quoted with approval in United States v. Drummond, 511 F.2d 1049 (2d Cir. 1975).

Furthermore, the remaining delay during this almost sixteen month period, representing two Government continuances (from May to August 1974 and November 1974 to February 1975) to locate Flynn, appellant's co-defendant, were similarly inexcusable. There was no showing that appellant was in any

way responsible for the co-defendant's flight. Moreover, Flynn's presence was in no way essential to appellant's trial. Compare Barker v. Wingo, supra, 407 U.S. at 531 (missing witness justifies appropriate delay).

On this record there can be no question that appellant vigorously and frequently asserted his desire for a speedy trial, the third factor in the Barker balancing test. Almost immediately following his arrest, appellant wrote a letter to the United States Attorney informing him of his desire for a speedy trial. When the Government first moved for a three-month extension to locate Flynn, counsel clearly objected to the Government's request, asserted that appellant was prejudiced by the delay, and urged that a speedy trial be afforded him. Moreover, appellant objected to the court's continuance of the trial in August 1974. On November 4, 1974, the defense moved to dismiss the indictment on speedy trial grounds. Later, counsel also objected to the continuances granted by Judge Motley in February and June 1975. Finally, on September 2, 1975, the first day of trial, a second motion to dismiss for lack of speedy trial was filed. The record thus leaves not a shred of doubt that appellant forcefully demanded a speedy trial, early and often. "The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." Barker v. Wingo, supra, 407 U.S. at 531-532.

Finally, appellant suffered substantial prejudice by the

delay. As counsel noted on several occasions, the pendency of the federal detainer against appellant rendered him ineligible for certain rehabilitative programs in Massachusetts. Compare Bureau of Prisons Policy Statement No. 7500.14A at 1 (January 7, 1970). This disadvantage is a form of prejudice that the speedy trial guarantee is specifically designed to protect against. Smith v. Hoey, 393 U.S. 374 (1968); Prince v. State of Alabama, 507 F.2d 693, 704, 707 (5th Cir.), cert. denied, 96 S.Ct. 147 (1975); see generally Note, Detainers and the Correctional Process, 1966 Wash.U.L.Q. 417. We note also that appellant's rehabilitation was necessarily delayed by by his shuttling back and forth between West Street and Massachusetts, an action which not only violated the Interstate Agreement on Detainers, but which would not have occurred had appellant been afforded a speedy trial in May 1974.

Moreover, the delay in sentencing here has created the possibility that appellant will have to spend time incarcerated in a federal institution, an event which would not have occurred had he been afforded a speedy trial. Thus, if appellant is not granted federal parole, he can expect to be incarcerated on his five-year sentence until approximately June 1979 -- the five-year sentence imposed in October 1975 minus good time (see 18 U.S.C. §4161). However, appellant is eligible for parole in the concurrent state sentence in August 1977. Thus, the delay in trying appellant creates the possibility that his sentence will not be fully concurrent

with the state sentence. The loss of opportunity for full concurrency in his sentences is another form of prejudice which the speedy trial right is designed to protect. Smith v. Hoey, supra; Prince v. State of Alabama, supra.

In sum, appellant's speedy trial claim meets all four of the criteria mentioned in Barker v. Wingo, supra. Accordingly, the judgment of conviction must be reversed and the indictment dismissed.

Point III

BECAUSE THE DELAY IN THIS CASE VIOLATED THE SOUTHERN DISTRICT PLAN FOR THE PROMPT DISPOSITION OF CRIMINAL CASES, REVERSAL OF THE CONVICTION AND DISMISSAL OF THE INDICTMENT ARE REQUIRED.

Rule 4 of the then-applicable Southern District Plan for Achieving Prompt Disposition of Criminal Cases provided that:

> In all cases the Government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest.

In this case, a complaint was filed against appellant on November 11, 1971, charging him with bank robbery. Appellant first became available to the Government on February 8, 1974. While the Government notice of readiness on the superseding indictment was filed on April 1, 1974, no notice of readiness was ever filed on the second indictment. In fact, the earliest the Government can be said to have been ready for trial was on February 18, 1975, the trial date which Judge Motley set following the order granting the Government's final request for a continuance. But compare United States v. Cuomo, 479 F.2d 688, 693 (2d Cir.), cert. denied, 414 U.S. 1002 (1973) (1973). Thus, there was a delay of more than a year between appellant's availability and the Government's readiness for trial. The record shows that of this period there was a delay of over ten months which was in no way attributable to appellant and which, we submit, is not properly excludable under

Rule 5 of the Southern District Plan. The delay consists of the following periods:[21]

1 month, 23 days	February 8, 1974	Appellant is convicted in Massachusetts
	April 1, 1974	Government moves to require handwriting and hair exemplars
22 days	April 25, 1974	Appellant is held in contempt on Government's motion.
	May 17, 1974	Government motion to continue trial because co-defendant was a fugitive
3 months	May 22, 1974	Government motion granted and trial adjourned for three months
	August 21, 1974	
1 month, 9 days	August 22, 1974	
	September 30, 1974	Defense motion to require production of exculpatory evidence
16 days	October 16, 1974	Defense motion denied
	November 1, 1974	Government's second motion to adjourn trial because co-defendant is a fugitive
3 months, 14 days	November 4, 1974	Government motion to continue granted
	February 18, 1975	Trial continued by Judge Motley
10 months, 24 days		

[21]The following periods are excludable: the period of time between the filing of the complaint and appellant's arrest is excludable by virtue of Rule 5(d) of the Speedy Trial Rules,

The critical delays on this record were the two applications for continuances consisting in total of six months and fourteen days, granted in the hope of locating Flynn. The Government defended its requests under Speedy Trial Rule 5(e), which excludes "a reasonable period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial has not run and there is good cause for not granting a severance." However, reliance on this section is

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(Footnote continued from the preceding page)

which exempts "the period of delay resulting from the absence or unavailability of the defendant." The period between appellant's arrest in October 1973 and his conviction in Massachusetts is apparently excludable under Rule 5(a), which excludes "the period of delay while proceedings concerning the defendant are pending, including but not limited to ... trial of other charges, and the period during which such matters are sub judice." That same subsection excludes the periods of time during which pretrial motions are pending, a subsection which relieves the Government of its obligation for the delays, in this case, during which its motion to require handwriting and hair exemplars was pending (April 1- April 25, 1974); the period of time during which a defense motion to require the production of exculpatory evidence was pending (September 30, 1974-October 16, 1974), and the periods of time during which the Government's motions for a continuance and appellant's speedy trial motions were determined (May 17-May 22; November 1-November 4, 1974).

misplaced. First, the Government made no showing on the record[22] that there was any likelihood that the co-defendant, Flynn, would be found within each three-month period requested, and in fact Flynn was never located. More important, there was no "good cause" to deny a severance. Appellant repeatedly asserted his right to a speedy trial, which could only have been protected by a severance. Moreover, appellant claimed he was prejudiced by the delay by being denied rehabilitative opportunities in Massachusetts, and in fact he was so prejudiced. Judge Bauman seemingly recognized that severance was the appropriate remedy here as early as April 25, 1974. In setting a trial date of May 28, 1974, he noted that if the co-defendant were not found, "[s]o if I have to try the case twice when they pick up the other fellow, I will" (Minutes of Hearing of April 25, 1974, at 17).

Finally, the Government argued below that appellant's failure to furnish hair exemplars on April 25, 1974, rendered the entire period following that refusal excludable under Rule 5(c)(i), which excludes time during which "evidence material to the Government's case is unavailable, when the prosecuting attorney has exercised due diligence to obtain such evidence

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[22]Appellant's argument on this point is hampered somewhat by the fact that appellant as yet has not been afforded access to the sealed affidavits submitted to Judge Bauman and Judge Motley. Our request to examine these affidavits is pending with the United States Attorney's office at present.

and there are reasonable grounds to believe that such evidence will become available within a reasonable period." The simple fact is that there were no reasonable grounds to believe, after appellant was held in contempt on April 25, 1974, that such evidence would be furnished. Indeed, the Government seemingly recognized as much by refusing to move again at any time subsequent to April 25 that the exemplars be furnished or to urge Judge Bauman or Judge Motley to hold appellant in criminal contempt. The Government argument, in essence, is that appellant was estopped from invoking the speedy trial rules by his refusal to furnish hair exemplars. Nothing in the rules supports such a position, and no case has ever so held. We respectfully submit that the Government's position is without merit.

In sum, the inordinate delay in this case which resulted in a violation of the Southern District's prompt disposition rules requires reversal of the judgment and dismissal of the indictment.

CONCLUSION

For the above-stated reasons, the judgment below must be reversed and the indictment dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

September 28, 1976

I certify that a corrected copy of this brief ~~and appendix~~ has been mailed to the United States Attorney for the Southern District of New York.

David L. Goldfarb